



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN 19, 1990

OFFICE OF
SOLID WASTE AND EMERGENCY
RESPONSE

Alan C. Campbell
Dow, Lohnes & Albertson
1255 Twenty-third Street, N.W.
Washington, D.C. 20037

Dear Mr. Campbell:

This is in response to your December 27, 1989 letter forwarding an earlier letter request by Jane Oglesby for an advisory opinion from the Environmental Protection Agency's office of General Counsel. I do not have any record of the first request. In any case, I apologize for any delay that may have occurred.

According to Ms Oglesby's letter, your firm is interested in determining the allocation of responsibility between the owner and operator of an underground storage tank ("UST") under the technical and financial responsibility regulations promulgated by the EPA on September 23, 1988 and October 26, 1988. The fact situation posed by Ms. Oglesby concerned an UST leased to and operated by a private corporation solely for the purpose of powering an auxiliary generator, while actual title to the UST is held by the Federal Communications Commission.

The answer described paragraph 1 of Ms. Oglesby's letter concerning compliance with the UST financial responsibility regulations appears to be accurate, though the reasoning is incomplete. Section 280.90(c) of the financial responsibility regulations read, "State and Federal government entities whose debts and liabilities are the debts and liabilities of a state or the United States are exempt from the requirements of this subpart." This provision exempts the State or Federal government entity from compliance with the financial responsibility regulations where the State or Federal government entity is an owner or an operator of an UST. According to the preamble to the final financial responsibility regulation, EPA determined that it was not necessary to require that such entities demonstrate financial assurance as EPA assumed that they have the requisite financial strength and stability to pay for corrective action and third party liability costs arising from UST releases. 53 Fed. Reg. 43322, 43328 (1988). EPA interprets the regulations to mean that government entities covered by Section

280.90(c) have demonstrated financial responsibility. Under §280.90(e), the regulations read that, if the owner or operator of a tank are separate persons, only one person is required to demonstrate financial responsibility. Thus, the operator of an UST that is owned by the federal government is not required to demonstrate compliance with the financial responsibility regulations. However, you should note that 280.90(e) also states that both the owner and the operator are liable in the event of noncompliance with the financial responsibility requirements in general.

The discussion in paragraph 2 of Ms. Oglesby's letter does not appear to be correct. According to the letter, the Hotline stated that the operator of the UST is primarily responsible for ensuring compliance with the notification, reporting and record-keeping requirements under 40 CFR 280.22 and 280.34.

The individual, subsections of § 280.34 specifically state that 'owners and operators' must comply with the reporting and recordkeeping requirements. While it may be easier for the operator of an UST to comply with these requirements, the regulations do not distinguish between owners and operators and thus do not establish that the operator is "primarily responsible" for ensuring compliance with these provisions.

The provisions of 230.24 impose some requirements on owners exclusively and some on both owners and operators. A careful reading of this section is necessary to determine whether only one or both parties may be liable in the event of noncompliance. Nothing in the language of this section would suggest, however, that compliance with the notification requirement is "primarily" the responsibility of the UST operator.

Finally, Ms. Oglesby's letter requested that EPA provide an advisory opinion stating that the owner of an UST will be held primarily responsible for ensuring compliance with the upgrading requirements under 40 CFR 280.21. Section 280.21 states that, not later than December 22, 1998, all existing USTs must comply with that provision's tank upgrading requirements. The language of 280.21 does not specifically assign this responsibility to the UST owner, operator, or both parties. However, section 280.10, the applicability provision for the technical regulations, states in relevant part that, "[t]he requirements of this part apply to all owners and operators of an UST system." Thus the requirements under §230.21 apply to both the owner and the operator of an UST system. Again, the regulations do not provide that the owner will be held "primarily" responsible for complying with this requirement.

I hope this letter provides your firm with useful guidance. If you have any further questions concerning these inquiries, feel free to contact me at (202) 382-7706.

Sincerely,

/s/

Kirsten Engel

cc: Jim McCormick
Sammy Ng
Dave O'Brien
Office of Underground Storage Tanks